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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PHILIP CHILD VILIKCHAI,

Defendant and Appellant.

D059806

(Super. Ct. No. SCD225942)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

In October 2010 Philip Child Vilikchai pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted that he was personally armed with a firearm (Pen. Code, § 12022, subd. (c)). Vilikchai also admitted that he had one prior strike conviction for attempted murder (Pen. Code, §§ 664, 187). Pursuant to the terms of the plea agreement, his maximum sentence would be seven years.

Thereafter, prior to the date of sentencing, Vilikchai brought a motion to strike his prior strike conviction under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

In February 2011 Vilikchai filed a motion to withdraw his guilty plea.

At Vilikchai's sentencing hearing, the court denied the motion to withdraw his guilty plea and his motion to strike his prior strike conviction. The court then sentenced Vilikchai to a term of five years eight months in state prison.

On appeal, Vilikchai asserts that the court abused its discretion in (1) denying his motion to withdraw his guilty plea because he was under the mistaken belief that he would receive probation, (2) denying his motion to withdraw his guilty plea because he was not adequately advised that his plea rendered him ineligible for probation, and (3) denying his motion to dismiss his prior strike conviction. We affirm.

FACTUAL BACKGROUND¹

On March 4, 2010, police officers went to Vilikchai's residence to serve an arrest warrant on his girlfriend. Once they arrived, they observed Vilikchai holding a black bag and attempting to flee the scene. He was eventually detained and arrested. The bag he was holding contained \$1,800 in cash, a plastic bag containing 11 MDMA tablets, 2.65 grams of methamphetamine in a small container, five individually wrapped bindles of methamphetamine, and a loaded .380-caliber handgun.

¹ Because Vilikchai's conviction resulted from a guilty plea, this abbreviated factual background is taken from the probation officer's report.

DISCUSSION

I. MOTION TO WITHDRAW GUILTY PLEA

Vilikchai asserts that the court abused its discretion in denying his motion to withdraw his guilty plea because (1) he was under the mistaken belief he would receive probation, and (2) the court failed to advise him of that he was statutorily ineligible for probation. We reject these contentions.

A. Background

In October 2010 Vilikchai informed the court that he wished to enter a plea agreement negotiated with the People. At the outset of the hearing, the court expressly informed him of the following:

"I indicated that I was prepared to reconsider the probation report, all other information provided at the time of sentencing, *I would consider probation, but I would not commit to placing Mr. Vilikchai on probation. The only commitment I'm making is that any custody would be less than seven years.*" (Italics added.)

Following this advisement Vilikchai pleaded guilty to possession of methamphetamine for sale (Health & Saf. Code, § 11378) and admitted that he was personally armed with a firearm (Pen. Code, § 12022, subd. (c)). Vilikchai also admitted that he had one prior strike conviction for attempted murder (§§ 664, 187). Pursuant to the terms of the plea agreement, it was agreed that his maximum sentence would be seven years.

On January 28, 2011, prior to the date of sentencing, Vilikchai filed a motion to strike his prior strike conviction under Penal Code section 1385 (all further undesignated statutory references are to the Penal Code) and *Romero, supra*, 13 Cal.4th 497. The trial

court tentatively indicated that it would likely not strike the prior strike conviction at the time of sentencing. Defense counsel expressed displeasure at the court's tentative ruling and indicated that she intended to make a motion to withdraw his guilty plea.

In February 2011 Vilikchai filed his motion to withdraw his guilty plea. In support of that motion, defense counsel filed a declaration indicating that she was under the belief that the court would "seriously consider a grant of probation" and that she believed probation was a "realistic possibility" at sentencing. Based upon this understanding, defense counsel advised Vilikchai that he should "seriously consider" taking the People's plea offer because it created an "opportunity for probation." Defense counsel also stated that Vilikchai was filing a motion to withdraw his guilty plea because of the court's tentative sentencing decision.

In April 2011 the court conducted the sentencing hearing and the hearing on Vilikchai's motion to withdraw his guilty plea. Vilikchai's initial trial counsel² testified that during the initial plea negotiations, the court indicated that it would "seriously consider probation." She understood, however, that the court "didn't guarantee probation."

She advised Vilikchai that although the court did not guarantee probation, "there was a really good chance for him to get probation." Defense counsel stated that although Vilikchai was initially reluctant to accept the plea agreement, he ended up deciding to plead guilty because of the "consideration of probation."

² Because Vilikchai's initial counsel, Pamela Lacher, was testifying at the hearing, attorney Albert Arena was substituted as counsel for purposes of the hearing.

Vilikchai also testified, stating that defense counsel told him the court would "seriously consider probation" and he was under the impression that he "might get probation." During cross-examination, Vilikchai admitted that he understood, based on the plea agreement, that the court could sentence him "anywhere from probation to seven years."

The prosecutor also testified. He stated that when he made the plea offer to defense counsel he mentioned that she could file a motion to strike the prior strike, "which [in his] opinion [was] the only way that they could get probation"

Following the testimony of witnesses, the court allowed the attorneys to present argument. Defense counsel argued that the court should grant Vilikchai's motion because he seemed to be under the impression that he would be granted probation. The prosecutor argued that the motion should be denied because everyone made it clear to Vilikchai that he was not guaranteed probation, and he still decided to plead guilty.

The court denied the motion. In doing so, the court noted that although it considered the possibility of imposing probation, it never gave any guarantees or promises that Vilikchai would receive probation.

The court then proceeded to impose sentence, first stating that it was formally denying Vilikchai's *Romero* motion to strike his prior strike conviction. The court imposed the lower term of 16 months, doubled due to the prior strike conviction, in addition to a consecutive three-year term for the firearm allegation, for a total sentence of five years eight months.

B. Analysis

Section 1018 provides that: "On application of the defendant at any time before judgment . . . , the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." In *People v. Weaver* (2004) 118 Cal.App.4th 131, 145-146, we described the general legal principles that apply to a defendant's motion to withdraw a guilty plea:

"A defendant who seeks to withdraw his guilty plea may do so before judgment has been entered upon a showing of good cause. [Citations.] . . . 'Good cause must be shown for such a withdrawal, based on clear and convincing evidence. [Citation.]' [Citations.] 'To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.]' [Citation.] 'The burden is on the defendant to present clear and convincing evidence the ends of justice would be subserved by permitting a change of plea to not guilty.' [Citation.]

" 'When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] On appeal, the trial court's decision will be upheld unless there is a clear showing of abuse of discretion. [Citations.]' [Citation.] 'Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.'"

"A plea may not be withdrawn simply because the defendant has changed his mind." (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) "The fact that [a defendant] may have been persuaded, or was reluctant, to accept the plea is not sufficient to warrant

the plea being withdrawn." (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919, citing *People v. Urfer* (1979) 94 Cal.App.3d 887, 892.)

On appeal, we will not reverse a trial court's decision whether to grant or deny a defendant's motion to withdraw a guilty plea unless an abuse of the court's discretion is clearly shown. (*People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796; *People v. Ravaux, supra*, 142 Cal.App.4th at p. 917.) We "must adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) A trial court abuses its discretion if it "exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice." (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

Here, the record shows the court did not abuse its discretion in finding that Vilikchai's guilty plea was knowing, intelligent, and voluntary. The court fully advised him that he was not guaranteed probation, but only that the court would consider probation, and that any custody would be under a seven-year lid. Defense counsel testified that she repeatedly informed Vilikchai that probation was not guaranteed. Indeed, Vilikchai himself testified that he was aware he could "argue for the possibility of probation," but that he understood "it was still also a possibility of seven years in prison" and that the court "had the ability to go anywhere from probation to seven years."

Thus, the evidence shows Vilikchai was fully aware of the nature of the plea agreement. It was only when the court indicated that it was not inclined to strike his prior strike conviction (a ruling that would render him ineligible for probation) that he decided

he no longer wanted the agreement. Such "buyer's remorse" is not a valid basis to withdraw a guilty plea. (*People v. Nance, supra*, 1 Cal.App.4th at p. 1456.)

Vilikchai's assertion that court failed to advise him of the consequences of his plea – that he was statutorily ineligible for probation – is also unavailing. Such an advisement would have been incorrect at the time of his guilty plea. The agreement left open the possibility of probation by arguing that the court should invoke its discretion to strike his prior strike conviction. Vilikchai would only be statutorily ineligible for probation if the court subsequently ruled against him on his *Romero* motion. It was only when the court denied the *Romero* motion that Vilikchai decided he no longer wanted to accept the plea agreement.

II. COURT'S DECISION NOT TO STRIKE VILIKCHAI'S PRIOR STRIKE

Vilikchai asserts the court abused its discretion in denying his motion to strike his prior strike conviction. We reject this contention.

A. Applicable Authority

There is a "legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law." (*People v. Carmony* (2004) 33 Cal.4th 367, 376.) Only extraordinary circumstances justify departure from this presumption. (*Id.* at p. 378.) The question is "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent

felonies.'" (*Id.* at p. 377, quoting *People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the trial court's denial of a *Romero* motion for abuse of discretion. (*People v. Carmony, supra*, at p. 376.)

B. *Analysis*

A review of Vilikchai's probation report provides ample evidence the court acted well within its discretion in denying his motion to strike his prior strike conviction. He was convicted in 1996 of possession of a controlled substance for sale. He performed unsatisfactorily on probation, testing positive for methamphetamine over a five-month period. In 1998, Vilikchai was convicted of being in possession of a loaded firearm while on probation. In connection with that crime, he admitted to gang involvement and that he loaned the firearm to fellow gang members. In 1998, he was also convicted of attempted murder, and it was found true that he personally used a firearm, resulting in great bodily injury. That crime involved his shooting a rival gang member in the abdomen. Vilikchai was sentenced to seven years in state prison for that offense. After being released on parole in 2005, he violated the gang conditions of his parole and was returned to custody for an additional 11 months.

Given this extensive criminal history, Vilikchai's violations of probation and parole and the circumstances of the current offense, he falls squarely within the spirit of the three-strikes sentencing scheme. Thus, the court did not abuse its discretion in denying his motion to strike his prior strike conviction.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.